Limits to the Legitimacy of Transnational Private Governance

Paper prepared for the CSGR/GARNET Conference "Pathways to Legitimacy? The Future of Global and Regional Governance", University of Warwick, 17-19 September 2007

by
Andreas Nölke
Institut für Politikwissenschaft
Johann Wolfgang Goethe-Universität Frankfurt am Main
Germany
a.noelke@soz.uni-frankfurt.de

and

Jean-Christophe Graz
Institut d'Etudes Politiques et Internationales
Université de Lausanne
Switzerland
jean-christophe.graz@unil.ch

1. Introduction

This paper explores the legitimacy of an increasingly popular type of private governance, i.e. transnational private governance. This concept refers to the ability of non-state actors to co-operate across borders in order to establish rules and standards of behaviour accepted as legitimate by agents not involved in their definition. Non-state actors not only formulate norms, but often also have a key role in their enforcement. Accordingly, the current privatization of rule-making and enforcement goes much further than traditional lobbying in allowing private actors an active role in regulation itself.

Transnational private governance has been hailed as an innovative solution to current challenges of regulation beyond the state. According to this perspective, transnational private governance does not only lead to more flexible and efficient policies, but also to a democratization of international politics, due to its ability to involve stakeholders such as NGOs in a more transparent and broad-based dialogue (Haufler 2002: 8-10). Furthermore, following Stigler's (1971) early critique on the ability of business interest to capture the state in public regulation, the state command-and-control approach to regulation is considered too inflexible and too costly, therefore inclined to be substituted by the market-based incentives of voluntary business self-regulation (Blundell and Robinson 1999). Much hope has been invested in the idea that capitalist externalities such as environmental degradation and the mistreatment of workers can be severely limited by standards developed and overseen by private institutions (Braithwaite and Drahos 2000).

Other observers, however, are deeply sceptical about the legitimacy of transnational private governance. These scholars focus on structural forces and power relations, in particular the structural power of capital. A structural conception of power emphasizes the environment in which strategic interactions take place. The rise of transnational private governance then points towards the development of the competition state, the deterritorialisation of capital and the related process of flexible accumulation (Graz and Palan 2004). Furthermore, it is connected with the rise of neoliberalism as a political ideology and an ongoing program of large-scale reforms that confers on the private sector an efficiency supposedly lacking in the public sector. In the absence of the democratic institutions of the nation state, transnational private governance in this perspective suffers from the fact that not all participating actors have equal power and some are not represented at all. This is particularly true for those of the

wider public interest and from developing countries that are lacking the detailed knowledge that is necessary to participate meaningfully in private norm-setting and enforcement. As Ottaway (2001: 266) points out, 'it is doubtful that close cooperation between essentially unrepresentative organizations [...] will do much to ensure better protection for, and better representation of, the interests of populations affected by global politics'.

Yet, we do not know much about the democratic qualities of transnational private governance. Generally, research about transnational private governance is still in its infancy, about ten years after the topic first has been explored (Cutler et al. 1999, Higgott et al. 2000). Existing literature has addressed the legitimacy question only in a very haphazard manner, either based on some very abstract and general considerations (e.g. Sundgren 1997, Brühl 2006 Risse 2006, Wolf 2006) or on the basis of studies of selected cases, primarily in the field of corporate social responsibility (Conzelmann and Wolf 2007). This paper evaluates the democratic quality of transnational private governance in a somewhat more systematic way. In order to do so, it will first discuss the adequacy of normative measures. Here, it will identify the complex theory of democracy as developed by Fritz Scharpf (1970, 1997; see also Schmidt 2000: 294-306) as particularly appropriate for a fair assessment of the democratic character of transnational private governance. The paper will then operationalise the core concepts of Scharpf's theory, input legitimacy and output legitimacy, to the specific case of transnational private governance.

We have collected the empirical evidence in a collaborative research project that has brought together some twenty researchers with particular expertise in the field of transnational private governance (Graz/Nölke 2007a). Within this project, we have compiled substantial experience on the most important issue areas where transnational private governance plays a prominent role, namely the financial sector, the internet and corporate social responsibility. In addition, we have added the stimulation of transnational private governance by regional integration schemes, given the recent surge of initiatives of the EU.

Regarding the financial sector, Daniel Mügge (2007) compares transnational private governance in Eurobond underwriting, auditing, and trading services for listed derivatives, while Sebastian Botzem (2007) puts accounting private accounting regulation into a diachronic perspective by analyzing the power shift from national professional associations to globally operating auditing firms. Finally, Eleni Tsingou (2007) explores one of the most

famous cases of involvement of private actors in transnational governance by looking at global banking standards and regulation on capital adequacy, the so-called Basel II framework.

Within the context of the debate on corporate social responsibility, Doris Fuchs (2007) presents a theoretical framework that captures the instrumental, structural, and discursive power of business in global environmental governance. Frans van Waarden (2007) focuses on the significance of output legitimacy in regulatory measures aiming at controlling risks with a special focus on food labelling. Thomas Conzelmann and Klaus Dieter Wolf (2007) share a similar research interest and examine, for their part, more specifically the framework conditions for implementing input legitimacy in transnational private governance, based on empirical studies of the Global Compact, the Forestry Stewardship Council and Responsible Care. Finally, Jeroen Merk (2007) analyses transnational private governance as a site of contention between different social and economic forces and discusses how compromises resulting from such processes can have an emancipatory effect for workers and civil society, based on empirical studies of the apparel and footwear industries. Put together, these studies cover all major issues that have been raised regarding the private regulation of transnational business, namely ecology, labour rights and consumers' concerns such as food quality.

Due to its close connection with highly dynamical technological developments, its inherently border-spanning character and, more broadly, as one of the most striking icon of globalisation, the Internet represents in many respects an avant-garde case of transnational private governance. Sven Bislev and Mikkel Flyverbom (2007) highlight the complexity of Internet governance, in particular the intermingling of public and private forms of regulation, with a study on the role of individual firms such as Cisco and H-P. Josep Ibanez (2007) presents a detailed analytical framework to examine the specific set of power relations and structures of the emerging regime of e-commerce. Finally, George Christou and Seamus Simpson (2007) investigate a recent initiative involving complex relations between public authorities and private actors; their study analyses how the European Union has taken an increasingly active role in Internet governance by setting up a private regulatory body in charge of the registry of the dot eu Top Level Domain.

A last set of studies explores how the European Union increasingly makes use of transnational private governance as a method of economic regulation. Otto Holman (2007) studies EU-sponsored public-private partnerships in the context of the Lisbon strategy, Stijn Smismans

(2007) focuses on industrial relations on the EU level and Karsten Ronit (2007) on the EU initiative to create an out-of-court complaints network for financial services. The European Union, however, is not the only regional grouping that is a driving force behind the increasing importance of transnational private governance. Naomi Gal-Or (2007) looks at evidence of parallel developments in the regionalisation process underway in the Western Hemisphere, with special attention given to private dispute resolution mechanisms in the context of the negotiations of the Free Trade Agreement of the Americas.

While there is thus little relevance in measuring or proving the degree of legitimacy of transnational private governance, our conclusions still contain a clear message that is highlighting the limits of the legitimacy of transnational private governance. While this type of governance demonstrates severe deficits in terms of input legitimacy, its assessment from an output legitimacy perspective also highlights a substantial number of constraints towards effective governance.

2. Conceptual framework: Scharpf's 'Complex Theory of Democracy'

Traditional theories of democracy would certainly be quite sceptical of the delegation of decision-making competence to transnational private governance institutions, given the corresponding weakening of elected representatives, the possibility of an asymmetrical distribution of political power between private actors, or the limited publicity and transparency of many private governance institutions. It may, however, be questioned whether it makes sense to uphold those traditional theories, given that their basic assumptions increasingly appear to be problematic. In particular in the context of economic interdependence (or globalization, as it is called more recently), nation states frequently may only have a limited room for manoeuvre, particular in terms of economic and social policies. If nation states are not able also to implement these decisions, democratic procedures degenerate towards an empty ritual. Furthermore, traditional theories of liberal democracy hardly are able to reflect the strongly increasing array of functions that the nation state has taken over during the 20th century, particularly in the field of social security. These functions intensify the demands that are placed on the state in terms of service delivery. In order to meet these demands, the state increasingly cooperates with private actors, thereby further reducing its ability for autonomous action. If we compare the current situation with the picture of the

state underlying the traditional theories of liberal democracy, one can argue that the core differences are the limitations in terms of autonomous and effective policy making capacities of the nation state, both from the outside (globalization) and from the inside (private actors).

Modern theories of democracy thus have to take stock of changing circumstances. A theory that does this, but at the same time tries to preserve the values of the traditional theories, is the so-called theory of complex democracy ("Komplexe Demokratietheorie") as developed by Fritz Scharpf (1970, 1997). This theory is based on a combination of normative and empirical considerations. In particular Scharpf is concerned about the ability of democratic states to implement citizens' preferences under conditions of economic and political internationalization, with a particular focus on questions of social justice and the representation of less privileged groups of society (Schmidt 2000: 295). At the core of Scharf's theory is the argument that two criteria have to be met in order to allow for a legitimate democratic rule:

> "Democracy aims at collective self-determination. It must thus be understood as a two-dimensional concept, relating to the *inputs* and to the *outputs* of the political system at the same time. On the input side, self-determination requires that political choices should be derived, directly or indirectly, from the *authentic preferences* of citizens and that, for that reason, governments must be held accountable to the governed. On the output side, however, self-determination implies *effective fate control*. Democracy would be an empty ritual if the political choices of governments would not be able to achieve a high degree of effectiveness in achieving the goals, and avoiding the dangers, that citizens collectively care about. Thus, input-oriented authencity, and output-oriented effectiveness are equally essential elements of democratic self-determination" (Scharpf 1997:19, emphasis in original).

The comprehensive character of Scharpf's theory makes it particularly suited to appraise democratic qualities of transnational private governance. It takes the contemporary circumstances for the functioning of modern democracies into account, circumstances that are also characteristic for the concept of transnational private governance, with its emphasis of public-private networks and the relevance of transnational politics. Scharpf's theory has a slightly positive bias here, because networks play a prominent role within Scharpf's (more analytical) theory of "actor-centred institutionalism" (see Scharpf 2000: 231-240, Sørensen/Torfing 2004: 29). Yet, Scharpf's theory is analytically quite open, and not fixed on

a specific model of democracy. Moreover, Scharpf takes a broader view on democratic legitimacy, if compared with theories that only focus on input or only on output. Thus it does not come as a surprise that most studies that discuss the democratic legitimacy of transnational private governance have utilised the Scharpf framework (Benz/Papadopopoulos 2006b: 274, Brühl 2006: 238, Risse 2006: 185, Wolf 2006: 202) – although none based on our comprehensive evidence.

In order to operationalise Scharpf's concepts for a study of transnational private governance, we will thus both look at output legitimacy (effectiveness) and input legitimacy (citizen representation). Output legitimacy furthermore will be assessed in two steps: First, we will look at the empirical scope conditions of transnational private governance: is this form of governance really able to address problems in manifold locations, or only under very narrow empirical circumstances (section 3)? Second, if addressing a problem, is transnational private governance really able to mobilize the efficiency advantages ascribed to by its proponents (section 4)?

3. Output legitimacy: the limited empirical scope conditions of transnational private governance

When is transnational private governance a prominent phenomenon in international politics? Our findings suggest that it is bound to a certain system of production (neoliberalism), certain issue areas (regulatory policy) and certain market structures (oligopolies). Furthermore, in order to play a meaningful role, it needs the support of public authorities, the availability of specific analytical resources and broadly coinciding values between public and private regulators. Thus, the output legitimacy of transnational private governance is heavily limited by its narrow empirical scope.

A social system of production that is characterized by neoliberalism

Given the absence of comprehensive long-term studies on transnational private governance, we should be careful in claiming that transnational private governance would only exist in the current context. As discussed by van Waarden (2007), the private regulation of economic affairs was very prominent in the early evolution of capitalism, at least on the domestic level. However, many cases of transnational private governance examined reflect a real shift in the organisation of the world economy in recent decades. When implemented within EU arena, it

is inextricably related to the neoliberal turn taken by the European integration since the 1980s (Holman 2007). In governing the Internet revolution, it follows the dramatic deregulation of telecoms markets (Ibanez 2007). Another sector where the strong economic liberalisation has contributed to the evolution of transnational private governance is the financial sector (Botzem 2007, Mügge 2007, Tsingou 2007). Similarly, the prime concern of codes of corporate social responsibility was from the outset the development of global value chains outsourcing business activities in the South (Merk 2007). The focus of CSR on certificates and brands in no way undermines neoliberal core values such as consumerism. Transnational private governance can also mitigate a hindrance to the free operations of international markets, such as Fin-Net in financial services (Ronit 2007) or distinct dispute resolution mechanisms in NAFTA and FTAA (Gal-Or 2007). Finally, with some typical constraints brought forward by neoliberalism (such as the mobility of capital undermining the classical instrument of class struggle), labour is inclined to support transnational private governance as a 'second best' solution, as more forceful public redistributive options are politically difficult to enforce (Smismans 2007).

Of course the effects of unfettered markets alone are not enough to explain such developments. The declining ability of states to regulate markets and the political unwillingness to do so play a crucial role, too. In facing threats and uncertainties from abroad, states quickly run into the limits of their own legal jurisdictions. Resorting to (or tolerating) transnational private governance can therefore easily become a providential tool less bound to territorial jurisdiction (van Waarden 2007), clearly related to the intellectual climate, the material reality, and the political project behind neoliberalism. The Internet appears to be a model case in this regard, as preferences of the US government were – before security concerns gained the upper hand – put forward to keep the net free from the public regulation that has been encountered in telecommunications or broadcasting (Christou and Simpson 2007). More generally, self-regulation by business actors is easily promoted as the privileged route to overcome cumbersome or inefficient public regulations (Bislev and Flyverbom 2007, Fuchs 2007, Tsingou 2007). Thus, we can conclude that transnational private governance is strongly bound to neoliberalism which goes a long way to explain its current ppularity. The reliance of transnational private governance on neoliberalism, however, could also reduce its importance in the future, in accordance to the potential demise of such an intellectual climate (Fuchs 2007).

A focus on regulatory policy (but with significant distributional consequences)

Except on private dispute resolution, the limitation of transnational private governance to regulatory policies is more than obvious, be it the regulation of the Internet, financial markets, accounting rules, food safety, or social and environmental standards. Yet, these regulatory policies may have major redistributive effects. In derivatives trading or auditing, firms may be excluded from the market (Mügge 2007); in the arena of Internet domain names trade offs take place between actors claiming ownership of the same name (Bislev and Flyverbom 2007, Christou and Simpson 2007); codes of corporate environmental responsibility can have serious distributive consequences, particularly for those companies that have not been involved in their development (Fuchs 2007).

Policy issues other than regulatory policies, however, are usually not covered by transnational private governance, thereby limiting its empirical scope. While many of these 'missing' issues are quite obvious, given that they fall into the core competence of the nation state (e.g. the provision of military security or constitutional policies), the absence of explicitly (re-) distributive policies from transnational private governance is more striking. Even in the field of industrial relations – the most directly redistributive field potentially targeted – the focus is not on the main redistributive issues such as wage relations or social expenditures, but on mild regulatory concerns such as certain labour conditions (Smismans 2007, Merk 2007). According to Holman (2007), however, this discrepancy can be fully explained, as it epitomises a form of 'asymmetrical regulation' where the distinct issues within the ambit of regulation at the transnational level limit the national capacity to act, notably in the field of social policies.

A market structure that shows a limited degree of competition (an oligopoly)

One of the most specific mechanisms that supports – but at the same time also limits – the evolution of transnational private governance is the pattern of inter-firm cooperation in the markets that are being regulated. As Mügge (2007) shows in much detail with regard to the financial sector, it is much easier for private actors to promote such policies when only a few big players are involved and have settled early competitive struggles which any new market faces. By emphasizing that mature markets are more prone to self-regulation, this finding adds a significant time dimension to the analysis of transnational private governance. The

importance of market structures with a limited degree of competition cut across the three other cases focused on finance (Ronit 2007, Tsingou 2007, Botzem 2007). Oligopolistic market structures are also important for those parts of Internet governance that deal with its technical infrastructure, since the latter is predominantly provided by a few big companies such as Cisco or HP (Bislev and Flyverbom 2007). In the broader picture of e-commerce, strong concentration processes, if not oligopolies, are also evident. Thus, telecommunication operators, PC producers, software firms or big content producers support transnational private governance initiatives (Ibanez 2007). The allocation of domain names – with a very competitive registration marketplace of 1500 or so companies for the dot eu name – could appear to be at great variance from such an assumption; yet incidentally, the initiative here did not come from the market, but from the European Commission, though the two developed a mutually supportive axis in the early stages (Christou and Simpson 2007). Although oligopolies may differ from a genuine prominence of large firms (in well defined market segments, small enterprises can form an oligopoly), in most cases these phenomena are closely interrelated. Company size also matters in corporate social responsibility. Here the mechanism works via easily identifiable branded names and retail companies that are more vulnerable to boycotts and political consumerism than others (Conzelmann and Wolf 2007, Fuchs 2007, Merk 2007). Finally, transnational private governance in the EU is also largely supported by its exclusive focus on 'big business', as amply illustrated in the cases of the strategic importance of the Competitiveness Advisory Group (CAG) (Holman 2007) or the under-representation of small and medium-sized enterprises in the European social dialogue (Smismans 2007).

The support by international institutions, in particular the European Union

The EU in general, and the European Commission in particular, has come out as a major driving force behind the spread of transnational private governance. Promotion of this type of governance is part of a systematic and broad-based strategy towards regulatory innovation (Holman 2007). A typical case in this respect is the dot eu TLD: the whole system around Eurid has been set up upon initiative of – and is responsible to – the European Commission (Christou and Simpson 2007). The Commission is also the major player behind the launch of Fin-Net as a Europe-wide out-of-court complaints network (Ronit 2007). IASB accounting standards have become almost global, thanks to its adoption by the European Union (Botzem 2007). In auditing, the completion of the Single Market secured the recent drive towards a

more comprehensive form of transnational private governance (Mügge 2007). Without the active encouragement of the European Commission, there would not have been a social dialogue at the European level – and even here, its actual implementation via European-wide collective agreements only occurred when the Maastricht Treaty provided a higher degree of institutionalisation (Smismans 2007). Thus we can conclude that the support of the EU is a major pre-condition for the prevalence of transnational private governance.

To a more limited extent, we can identify the support of regional integration processes in a context of lower levels of institutionalization, such as NAFTA (Gal-Or 2007) or with other international institutions such as the Basel Committee (Tsingou 2007). During the early stages of the IASB, for example, the involvement of the Basle Committee, IOSCO, the IMF and the World Bank was decisive (Botzem 2007). The private regulation of food security does not only rely on the oversight of the European Commission, but also of the Codex Alimentarius – a joint body of the World Health Organisation and the Food and Agriculture Organisation (van Waarden 2007). Moreover, ILO conventions are a major backdrop for corporate social responsibility initiatives. Without them, a mobilization for adequate labour conditions would be far more difficult (Merk 2007). International organisations and agreements also stand behind the transnational private governance of the environmental sphere, as Agenda 21, CITES and the International Tropical Timber Agreement indicate with regard to the Forest Stewardship Council (Conzelmann and Wolf 2007).

Beyond such an institutional embeddedness, the threat of public (national or intergovernmental) regulation can be a major factor leading to the evolution of transnational private governance. For example, the private governance of the Internet was conceived as a clear-cut alternative to public regulation, be it at the domestic and global level alike (Ibanez 2007). Similarly, the Responsible Care Program in the chemical industry was created after major crises and under the expectation that public regulation would be forthcoming, if not prevented by private initiatives (Fuchs 2007). Still, not all cases of corporate social responsibility are as closely linked to the threat of public regulation. No public regulation, for instance, could be comprehensive enough to affect the 2000-odd companies from a variety of sectors that have joined the Global Compact (Conzelmann and Wolf 2007).

A strong reliance on highly specialised technical or professional knowledge

The existence of highly specialised technical or professional knowledge within the private sector appears to be another major pre-condition for the prevalence of transnational private governance. This is all the more the case when public regulatory institutions lack the knowledge required to follow the pace of technical innovation. Under such circumstances, public authorities will be eager to subscribe to self-regulation, in order to prevent the costs for developing, implementing, monitoring and enforcing regulation (Mügge 2007, Tsingou 2007, van Waarden 2007).

Particularly in the case of Internet regulation, knowledge is a key resource, given that the core importance of the historic transformation that goes hand-in-hand with the rise of the Internet is based on fundamental changes of the traditional way of producing and transmitting knowledge. The sheer complexity of technical developments forces government officials to leave important governance functions to an expert-driven self-regulation. In the same time, this delegation of authority favours those private actors that have already accumulated a substantial amount of knowledge resources, be they big multinational companies in case of e-commerce, or experienced registry operators in case of the dot eu TLD (Bislev and Flyverbom 2007, Christou and Simpson 2007, Ibanez 2007).

Private expert knowledge is also widely recognised as a core resource for governing global finance (Tsingou). This may even lead to a power shift between the actors concerned, as it is occurring in the domain of auditing from professional associations to globally operating service firms (Botzem 2007). In the field of social regulation, the European Commission relies on the professional knowledge of top representatives of peak capital and labour organisations to draft its policy proposals (Smismans 2007). In corporate social responsibility too, a growing professionalisation pervades the movement. As outlined above, the collection of data on company behaviour has become a major business (Merk 2007). All participants in the governance structure of the FSC need to contribute specific problem-solving resources (Conzelmann and Wolf 2007). Yet, we should remain wary in assuming that private expert knowledge resources are essential in transnational governance. As Fuchs (2007) reminds us, the discursive power of business has purposefully constructed the image that without its knowledge-intensive resources, effective regulation would not be possible.

The need for basic common values of private regulators (and their public counterparts)

Transnational private governance is frequently based on a common educational and/or professional background of those actors involved in it, supported by learning processes through regular meetings, or by a tradition of self-regulation as observed in the financial sector. Professions can play a major role here, as in accounting (Botzem 2007). In a broader perspective, transnational private governance of e-commerce has been made much easier by the dominance of US free market values among the participants (Ibanez 2007), as well as the general libertarian, state-sceptic attitude within the Internet community (Christou and Simpson 2007). In the field of corporate social responsibility, the cooperation between stakeholders with varying backgrounds is made easier by common commitments for values such as sustainable growth, being reinforced by common learning processes (Conzelmann and Wolf 2007). In contrast, the difficult and cumbersome development of transnational private governance in the European social dialogue may also be attributed to the basic value differences between capital and labour; together with their uneven power relationship, this precondition contributes at least to the limited scope of the social dialogue, confined to a few consensual issues such as occupational health and safety.

Value homogeneity, however, is not only an issue among the protagonists of transnational private governance, but also between them and the public regulators backing them up. Again, the case of the European social dialogue is very instructive here. Instead of propagating a comprehensive European welfare and industrial relations system, social partners, Member State governments and the Commission all agree on narrowly circumscribing their agenda, so as to ensure its compatibility with a European project confined to the common market (Smismans). This value homogeneity between private regulators and public supervisors is furthermore epitomised in the case of the Competitiveness Advisory Group, whose members are carefully selected on the basis of their shared commitment to the European market-making project (Holman 2007). Shared values between private regulators and public authorities are a common feature beyond the European Union, in other regional integration processes and international institutions. In global banking, the tradition of ‘revolving doors’ between the public and private sectors provide a strong support for homogenising values shared by the transnational policy community (Tsingou 2007). Finally, it should be noted that, at least partially, it was the considerable discursive power of business that purposely created such values in the first place (Fuchs 2007). Still, business does not always succeed with creating

this value homogeneity, thus limiting the empirical scope conditions for transnational private governance.

4. Output legitimacy: the limited advantages of transnational private governance

Above we have demonstrated that transnational private governance is only prevalent under very selective empirical circumstances. But let us assume favourable circumstances, is transnational private governance really able to mobilize the advantages ascribed to by its proponents? Departing from Scharpf's theory of complex democracy, transnational private governance might only be considered legitimate if it is more successful than public regulation through democratic governments, given the higher input legitimacy of the latter.

In order to check these claims, we will proceed in two steps. First, we will study some popular claims about the character of transnational private governance: A shared assumption in the literature is that informal and non-hierarchical forms of governance are increasingly replacing command-and-control hierarchical and formal types of state regulation, thereby leading to a higher degree of efficiency. Is this true? Second, we take a look at effectiveness of specific institutions, first from a more narrow problem-solving perspective, than from a broader, Coxian view.

Less informal–flexible than commonly expected

Accounting standards provide a prime example of how transnational private governance is inclined to be more formalised than is often acknowledged. Formalisation is a process which creates and strengthens authority. Private actors require such authority since international law does not acknowledge these actors as subjects. As private actors cannot create hard law, soft law becomes their first choice. Thus, in order to become effective private regulators, professions codify their knowledge in certain formal rules or programs (Botzem 2007). This seems to be also true for financial markets in which professions have less say than oligopolistic groups of firms such as in Eurobond underwriting or auditing (Mügge 2007). Similarly, codes of corporate social responsibility are increasingly formalised in order to reinforce their claim to trustworthily respond to political contestation targeting inconsistencies in implementation, monitoring and verification (Merk 2007). The formalisation of transnational private governance also affects dispute resolution mechanisms. Whilst it was

originally conceived as a more informal and cost-effective tool than litigation in public courts, it now tends to take as much time and money, as well as detailed procedures (Gal-Or 2007). Finally, within the European context, our cases on the European social dialogue (Smismans 2007) and banking regulation (Tsingou 2007) reinforce our assumption that the implementation of transnational private governance heavily hedges on the regulatory route. Thus we can conclude that transnational private governance is not necessarily so much more informal than public regulation, thereby limiting its potential advantage in output legitimacy.

Limits to the consensual character of transnational private governance

To become truly effective, transnational private governance is neither informal, nor necessarily consensual. When incorporated in EU legislation, it is actualised erga omnes, including on those parties that did not delegate their sovereign rights or were not setting the rules. In cases of more stringent self-regulatory policies such as the dot eu governance framework, public policy imperatives prescribed by the Commission also circumscribe the consensual character by introducing various structural constraints (Christou and Simpson 2007). Similarly, some of the standards developed by the International Accounting Standard Board have hardly succeeded in becoming consensual regulation, as they are still heavily contested, even after their final adoption (Botzem 2007). In the financial sector, those companies largely excluded from the market by transnational private governance such as in Eurobond underwriting or auditing will probably not subscribe to the view that this form of governance is based on consensus (Mügge 2007); nor will suppliers finding their GMO-products banned from the shelves by big supermarket chains (van Waarden 2007). Furthermore, many cases of transnational private governance reflect the unintentional form that may be taken by the structural and discursive power of business. Although not necessarily contested, it hardly remains consensual (Fuchs 2007). In the domain of corporate social responsibility, however, more consensual forms of transnational private governance may well occur as a result of substantial learning processes (Conzelmann and Wolf 2007) or negotiated social compromises (Merk 2007). Still, we cannot necessarily assume that transnational private governance is based on the consensus of those regulated.

The often hierarchical character of transnational private governance

Finally, the decentralised, non-hierarchical character of transnational private governance that is assumed by some of its proponents also faces strong limits. For instance, UEAPME (which represents small and medium-sized enterprises) had no other choice than to collaborate with UNICE – the organisation of larger industrial concerns – in order to be heard at the European

negotiation table (Smismans 2007). Similarly, in setting up a European Top Level Domain name for the Internet, the European Commission has created a unique form of 'regulated self-regulation' (Christou and Simpson 2007), of which Fin-Net can be seen as a variant for resolving some disputes in financial services (Ronit 2007). For its part, the International Accounting Standard Board went through a tremendous transformation towards a hierarchical complex of boards and committees (Botzem 2007). Even in the field of corporate social responsibility, the current 'anarchy' (Merk 2007) of a myriad of schemes increasingly looks ineffective. Various initiatives are currently introducing more formal and hierarchical mechanisms. According to Conzelmann and Wolf (2007), however, it is precisely this process of hierarchisation that could lead to a more inclusive and democratic form of transnational private governance, as the case of the Forestry Stewardship Council would suggest.

Moreover, transnational private governance frequently takes on a rather hierarchical character through public supervision. The European Union has become particularly prominent as a public institution closely supervising transnational private governance. Although the European Registry of Internet Domains (Eurid) is a private, not-for-profit company, it still works under close supervision of its 'double principals', the European Commission and the EU Member States. Even during the policy process that has led to the dot eu governance framework, Commission representatives acted as participants in the process of 'self-regulation'. Still formally a case of private self-regulation, the 'domestication' of Eurid leads to a set-up with close public supervision which echoes common EU regulatory state practice (Christou and Simpson 2007). The European social dialogue also takes places in the shadow of hierarchy. This is most obvious in case of the 'regulatory route' towards the implementation of its initiatives that relies on enforcement by public authorities. One may well question the 'private' character of this form of transnational governance. But even the main 'autonomous' European collective agreements have only emerged in response to initial regulation attempts by the Commission (Smismans 2007). This close combination of public and private elements is also present in the Competitiveness Advisory Group as participation from the public sector in its deliberations is a precondition to get the Commission to take over its recommendation (Holman 2007). Smaller and more technical forms such as Fin-Net are based on a dense collaboration with the public sector alike (Ronit 2007). Finally, IASC/IASB accounting standards only became a meaningful form of transnational private governance once adopted as a mandatory rule by the European Union after each standard was assessed

individually with the possibility of 'carve-outs' on certain rules, although the latter is more a defensive instrument (Botzem 2007).

Functional limitations: A substantial, but ultimately limited ability to solve problems

Transnational private governance can undoubtedly lead to concrete results in specific issue-areas. Yet, considering the significance of socio-economic concerns at stake, most of our empirical studies emphasise the limited ability of transnational private governance to solve large societal problems.

Within the empirical limitations of the framework conditions outlined above, transnational private governance can contribute to solving concrete issues, in particular when a stable regulation of a single sector is at stake (Conzelmann and Wolf 2007, Mügge 2007, Tsingou 2007, van Waarden 2007). This is how, for example, the e-commerce regime has established and maintained a new form of Internet order, and made a significant contribution to the development of the sector (Ibanez 2007). Similarly, the dot eu TLD regime – newly established at the time of writing – appears to work well in the accreditation of Internet names and the dispute resolution on name ownership (Christou and Simpson 2007). The International Accounting Standards Board has been successful in establishing accounting standards used on a wide basis around the world – a task not achieved by public authorities such as the European Union or the United Nations (Botzem 2007). The same conclusion may be drawn regarding the ability of Fin-Net to solve cross-national disputes in specific consumer-oriented financial services, thereby sheltering consumers from lengthy and expensive procedures in public courts (Ronit 2007). While the over-all influence of the corporate social responsibility movement should not be overstated, it has led to some real improvements, particularly regarding the general acceptance of an obligation by business, and some procedural issues for a more effective implementation (Merk 2007). The European social dialogue has also lead to concrete outcomes on issues previously blocked for many years, such as parental leave (Smismans 2007). Yet, most empirical studies emphasise strong limits in the ability of transnational private governance to solve problems, as it often leaves aside major socio-economic concerns, such as rebalancing the relationship between capital and labour. Whilst most of them focus on specific sectors, they also underline how transnational private governance is at pains to provide an overarching, inter-sectoral

framework. This type of meta-governance clearly remains a task of the public sector (Conzelmann and Wolf 2007).

In contrast to what can be expected in the domestic arena, transnational private governance still requires the support of public administrations and courts to be implemented. In his study, Smismans (2007) provides an illustration of this feature in comparing the 'regulatory route' of European collective agreements (backed up by a Council Directive) to the 'autonomous route' of direct agreements between unions and employers' association. Whereas the former excludes the realm of private governance, the latter, while including the private, is difficult to implement effectively, particularly in the new Enlargement countries. The European social dialogue is not the only case where implementation of transnational private governance is delegated to public actors. The same can be observed as far as privately developed accounting standards are concerned; in the European Union, EU legislation made them binding (Botzem 2007). In contrast, ongoing struggles to reinforce corporate social responsibility in global value chain and labour relations suggest that only independent private verification provides the required credibility of such forms of transnational private governance (Merk 2007). The same problem arises in case of business self-regulation on environmental matters. Many of the most prominent standards such as Responsible Care do not necessarily lead to substantial environmental improvements in practice, or these improvements remain very controversial (Conzelmann and Wolf 2007, Fuchs 2007). Standards that do have stringent requirements and verification schemes such as the FSC remain limited in their market share. Finally, if big firms have so widely joined the Global Compact, it may well be due to the fact that in pledging support to its ten principles, participants keep a free hand in deciding how and to which extent to implement them (Conzelmann and Wolf 2007).

Stabilisation of the current neoliberal economic order

Even if transnational private governance could be considered as successful according to the problem-solving criteria outlined above, there is still a larger problem, namely its potentially stabilising role for the current order of neoliberal capitalism. We have already noted that transnational private governance is supported by a neoliberal economic order, i.e. an order that is characterised by economic deregulation, the free play of markets, the preponderance of business over other societal constituencies and a deep distrust towards public regulation. Actually, transnational private governance is not only supported by neoliberalism, but can also be viewed as its supporter, by contributing to its stabilisation. In other words, they are mutually reinforcing. For example, the Competitiveness Advisory Group is part and parcel of

the political project to reinforce the European neoliberal agenda (Holman 2007). Dispute resolution mechanisms such as Fin-Net are meant to safeguard the smooth functioning of the Common Market in the field of financial services (Ronit 2007). Voluntary regulations such as codes of conduct are perceived by business as non-threatening to the current (neoliberal) order, since they do not challenge – at least in a short-term perspective – basic pillars of this order (Merk 2007). Other cases of transnational private governance have evolved in order to prevent governments from regulating markets, such as in Eurobond underwriting or Auditing (Mügge 2007). Since public regulation is usually stricter, this also limits the problem-solving contribution by transnational private governance, as in the case of environmental protection (Fuchs 2007).

Neoliberalism as an economic program is not equally benevolent to all parts of the business community. It generally favours big, transnationally mobile companies, in particular capital investors. The same can be stated for transnational private governance. One overriding concern of many of our contributions is that such governance particularly favours large and well-established multinational companies, in particular those from North America and the European Union (Holman 2007, Gal-Or 2007, Ibanez 2007). More specifically, some cases of financial market regulation are meant to support a market order that primarily benefits the existing oligopoly (Mügge 2007). Policies promoted by IASB benefits capital market actors such as institutional investors and financial analysts (Botzem 2007). The flip side of these findings is that transnational private governance may lead to social closure, therefore disadvantaging SMEs, newcomers or business from outside of the OECD, not to mention weakly organised labour or even more diffuse social movements.

Some scholars, however, notice that this prominent role of (big) business is also fragile, in particular if transnational private governance proves to be unable to fulfil those governance tasks assigned to it, thereby possibly leading to a backlash or, more generally, creating a site of contention between different social and economic forces (Fuchs 2007, Merk 2007). One of the potential counterweights to the neoliberal economic order, the European social dialogue – and particularly labour as its driving force –, is too weak to force management to the negotiation table on important issues. Most European collective agreements have produced procedural than substantial norms, and are based on rather soft legal instruments. The further weakening of labour during the process of enlargement may also explain why capital now suddenly accepts autonomous implementation by the social partners as risks are limited. Yet,

the European social dialogue can also be assessed as a small step in the right direction insofar it has led to horizontal collaboration and mutual awareness of labour unions within different EU Member States (Smismans 2007).

5. Input legitimacy: Limited participation and representation within transnational private governance.

Finally we address the more conventional issues of input legitimacy, concerns about democratic participation and representation. Unfortunately, it is not possible to generalize about the formal procedures for democratic representations across the diverse institutions of transnational private governance, given the diversity of these institutions. Instead we choose an indirect approach that looks at the representation pattern – both in terms of countries and of societal interests – within the institutions of transnational private governance. First of all, however, we have to take notice that there is a tension between an increasing reliance on transnational private governance and our established institutions of representative democracy.

Erosion of the regulatory capacity of democratically legitimized governments

Although nobody would argue that a concerted effort by the most powerful states would be unable to reverse the allocation of governance tasks to private actors, we still can conclude that transnational private governance is in many cases effectively undermining the free and unrestricted choice of policy options and instruments of individual governments, in spite of the fact that most of these private institutions are somehow supported by inter-governmental institutions. In some cases of Internet regulation, for example, the regulatory competence of a few private companies has clearly exceeded those of most public actors At the same time, these private actors follow a conscious strategy to keep public regulators out (Ibanez 2007). The same strategy can be observed in the financial sector, although it is not always successful (Mügge 2007).

One of the most fascinating cases of a clash between private governance and public regulation is the dot eu TLD. Whilst the Internet community expects a laissez faire-attitude, the European Union extends its well-proven ‘agencification approach’ to this issue area (Christou and Simpson 2007). It is still too early to assess, whether the complex dual agency model will

be able to satisfy the expectations of the Internet community. A similar clash between private regulators and public regulators has occurred in the field of accounting standards (Botzem 2007). Again, the European Union has formally reserved the right to assess each standard before adopting it. But the carve-outs it has made have caused much controversy, thereby substantially raising the costs for the use of this type of authority. Another challenging case of transnational private governance with regard to the suspension of public authority is the European social dialogue, in which the Commission renounces its competence altogether if peak associations of capital and labour agree on an issue and, thus, bypasses any intervention from the European Parliament or even the Council (Smismans 2007).

The European Union is not the only institution where we can observe the tension between transnational private governance and public control. While the democratic character of many governments of the global South may be felt wanting, it is striking that hardly any CSR schemes are concerned with whether the governments of producing states agree with improved labour standards that go hand in hand with effective CSR – or rather prefer to compete for investments on the basis of cheap labour or low environmental protection.

Over-representation of Northern interests

Many cases of transnational private governance, though in principle global, in fact depend on the implicit support of business from the core of the world economy. Whenever American firms control developments in an industry, governance arrangements will be based on the support provided by those firms (Muegge 2007). The emergent e-commerce regime is thought of as global, yet strongly anchored in the United States and heavily influenced by large American corporations (Ibanez 2007). The same applies for global banking regulation, with the difference that European banks also play a major role (Tsingou 2007). For their part, international accounting standards were first codified with some developing countries onboard; yet it is widely recognised that their role in decision-making is minimal and even further reduced during the recent reform leading to a reinforced role for City standards. In general, actors from the South hardly play a significant role in transnational private governance, except for those cases that explicitly deal with development issues in the South (Conzelmann and Wolf 2007, Merk 2007). Finally, the European social dialogue has also strong underpinnings in national industrial relations; as a result, it varies enormously across Europe (Smismans 2007).

Uneven representation of private actors

Moreover, although the term 'private' might lead us to believe that such transnational governance potentially concerns the private sphere as a whole, our cases show that only a limited range of actors is involved. The European social dialogue provides us with a clear-cut demonstration, as by definition it only includes peak associations of labour unions and employers' bodies. Yet, even within the broader category of labour, not all workers or their associations take part in the dialogue – especially in the Enlargement countries and in some sectors, major groups are notably absent. The same is true for capital, as the UEAPME case suggests that small and medium-sized enterprises are underrepresented in the decision-making of the European peak associations (Smismans 2007). Many environmental CSR codes have been designed by large corporations of the North, without involving small and medium-sized enterprises, not to speak of companies from developing countries bearing the cost of adopting the new standards. Conferences promoting CSR success stories frequently entail such high fees that critical NGOs cannot participate (Fuchs 2007). Most importantly, the participation of labour remains a problem even for the most progressive and comprehensive CSR schemes (Merk 2007). Furthermore, producers have much stronger incentives to invest in transnational private governance for the purpose of ordering markets than consumers do (Mügge 2007). Whenever consumer associations are present, their participation remains uneven as the dispute resolution mechanisms of Fin-Net clearly suggest (Ronit 2007).

Thus, unsurprisingly, big multinational companies frequently play a central role in transnational private governance. This observation not only applies to the usual suspects, such as large ICT firms in the Internet (Ibanez 2007), the G30 in global banking (Tsingou 2007), or the ERT in the Competitiveness Advisory Group set up by the European Commission (Holman 2007), but also to big brand and retail firms from the industrialised countries as privileged targets of CSR concerns (Conzelmann and Wolf 2007, Fuchs 2007, Merk 2007). More specifically, a distinct type of company seems to systematically gain advantages in transnational private governance – and sometimes only exists thanks to it: coordination service firms. In addition to the wide array of financial services provides by firms such as rating agencies or the Big Four auditing companies (Botzem 2007), as well as legal services in dispute resolution mechanisms (Gal-Or 2007, Ronit 2007), a whole new industry has also emerged in response to the joint development of global commodity chains and CSR codes. Intertek, SGS or Bureau Veritas have become the best-known firms specialised in inspection, tests and certificates (Merk 2007). The growing importance of social audits and other services

provided by such firms reflects a trend towards the commoditisation of transnational private governance bought and sold on markets.

6. Conclusion

Probing transnational private governance as a form of complex democracy following à la Scharpf suggests narrow limits in the legitimacy of such form of power. First, it is often unable to implement what it claims to offer (output). Furthermore, the problem-solving (output) contributions of transnational private governance are limited by the fact that this type of governance can only be found under very specific circumstances. And finally transnational private governance cannot claim a high degree of input legitimacy, given its shortcomings in terms of representation and participation.

As noted above, not all societal groups are equally represented within the decision-making institutions of transnational private governance, with a particularly powerful role being kept for major corporations or even oligopolies. If such governance is assessed against standard (domestic) models of democracy, it clearly remains inadequate, especially in terms of limited transparency and accountability (Holman 2007, Ibanez 2007, Tsingou 2007). This is particularly problematic in cases where private governance replaces public decision making, as in the European social dialogue (Smismans 2007), or where private governance is further separated from democratic control by the dual agency role of the European Commission (Christou and Simpson 2007). It does not only affect the making of laws, but also their adjudications such as the rising importance of private dispute resolution mechanisms suggests with regard to the limited independence of arbitrators, conflicts of interests, or transparency and confidentiality problems (Gal-Or 2007).

As transnational private governance will always remain unsatisfactory vis-à-vis traditional theories of (domestic) democracy – an assumption that could be shared for most forms of intergovernmental cooperation (Conzelmann and Wolf 2007) –, it is only against alternative models of functional democracy that somewhat more positive assessments can be made. Hence, tentative analyses of a 'constitutionalisation of international networks of technocrats' can be made (van Waarden 2007). Some studies explore how to overcome the democratic deficit of transnational private governance. In spite of all of its shortcomings, the European social dialogue is one of them, by guaranteeing a structured participation of weak interest groups such as labour (Smismans 2007). Similarly, Fin-Net as an inclusive scheme that

involves consumer associations and is supervised by the European Union is certainly to be preferred to pure industry self-regulation – although the reason for the inclusive model was less a concern of democratic legitimacy than of consumer confidence (Ronit 2007). Probably the most democratically legitimate of all the cases is the Forestry Stewardship Council, based on an elaborate system for the effective participation of a broad range of stakeholders with decision-making power (Conzelmann and Wolf 2007). Here, however, we may need to note a trade-off between the problem-solving contribution and the democratic legitimacy of transnational private governance, given the very limited market share of FSC-certified products. Since timber industries in many countries regard the FSC standard as being too strict, they have created competing labels with less severe criteria, thereby marginalising the FSC (Fuchs 2007). Thus, the rare case of transnational private governance with acceptable legitimacy has again found its limits, now in empirical terms.

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